United States Department of Labor
Employees' Compensation Appeals Board

V.O., Appellant	)	
and	)	**Docket No. 16-0609**
	)	**Issued: June 24, 2016**
U.S. POSTAL SERVICE, MILLARD STATION, Omaha, NE, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 11, 2016 appellant filed a timely appeal from a November 2, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than six percent permanent impairment of the left leg.

FACTUAL HISTORY

On October 24, 2011 appellant, then a 27-year-old transitional employee carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her ankle in the performance of duty. OWCP accepted the claim for a left ankle tibiofibular ligament strain and anterior tear, a left ankle calcaneofibular tear, a left ankle talus fracture, and osteochondritis

[1] 5 U.S.C. § 8101 *et seq.*

dissecans lesion, ankyloses of the left ankle, and a left intrasheath subluxation of the peroneal tendon.

On July 25, 2012 Dr. David J. Inda, a Board-certified orthopedic surgeon, performed a debridement of the osteochondritis dissecans lesion with microfracture, a ligament reconstruction of the left ankle, and an exploration of the peroneal tendons with tenosynovectomy. On March 20, 2013 he performed a repair of the superior peroneal retinaculum of the left ankle, a fibular groove deepening procedure, and tenolysis of the peroneal tendons.

In a report dated January 14, 2014, Dr. Inda related that appellant underwent "repeated procedures for peroneal tendon pathology and injury." Referencing Table 16-2 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[2] he found that appellant had six percent impairment of the lower extremity or nine percent impairment of the foot and ankle.

Appellant, on June 23, 2015, filed a claim for a schedule award (Form CA-7).[3] OWCP advised her by letter dated July 7, 2015 that she should submit an impairment evaluation from her physician addressing the extent of any permanent impairment in accordance with the A.M.A., *Guides*.

In an impairment evaluation dated July 17, 2015, Dr. Inda advised that appellant reached maximum medical improvement on July 8, 2014. Appellant underwent surgery for a torn peroneal tendon but continued to experience pain and reduced motion. Dr. Inda referenced his prior report of January 2014. He opined that appellant had six percent impairment of the lower extremity using Table 16-2 on page 501 of the A.M.A., *Guides* "for injury involving the peroneal tendon with moderate motion deficits and based on her examination." Dr. Inda noted that six percent left lower extremity impairment yielded nine percent impairment of the foot and ankle.

An OWCP medical adviser reviewed Dr. Inda's finding on August 6, 2015 and determined that it was insufficient to support a left lower extremity impairment rating as he did not apply grade modifiers or provide findings on examination. He recommended referral of appellant for a second opinion examination.

On August 19, 2015 OWCP referred appellant to Dr. Adam T. Kafka, a Board-certified physiatrist, for a second opinion examination.

In an impairment evaluation dated September 9, 2015, Dr. Kafka reviewed appellant's history of injury and surgeries. He discussed her current complaints of pain and tightness with prolonged walking. On examination Dr. Kafka found no edema, loss of sensation, or muscle atrophy of the leg or foot. He found "mild tenderness just proximal to the lateral malleolus," some loss of dorsiflexion and eversion, and pain with passive inversion. Dr. Kafka diagnosed a left ankle sprain with peroneal tendon dysfunction as a result of her October 24, 2011 work

[2] A.M.A., *Guides* (6th ed.) Table 16-2.

[3] In a decision dated January 8, 2014, OWCP denied appellant's request to expand her claim to include a back condition due to or as a consequence of her October 24, 2011 work injury. By decision dated March 24, 2015, it reduced her compensation to zero based on its finding that her actual earnings as an address management systems technician effective October 27, 2014, fairly and reasonably represented her wage-earning capacity.

injury. He opined that appellant reached maximum medical improvement on November 26, 2013. Citing the A.M.A., *Guides,* Dr. Kafka identified the most significant diagnosis as a class 1 peroneal strain with mild loss of motion using Table 16-2 on page 501, which yielded a default value of five percent. He applied a grade modifier of one for functional history for a mild deficit, a grade modifier of two for physical examination based on moderate findings, and no grade modifier for clinical studies as its use was not "confirmatory." Utilizing the net adjustment formula, Dr. Kafka adjusted the default value over one place to find six percent permanent impairment of the left lower extremity.

An OWCP medical adviser reviewed Dr. Kafka's report on September 23, 2014 and concurred with his impairment rating. He determined, however, that the date of maximum medical improvement was the date of Dr. Kafka's examination.

By decision dated November 2, 2015, OWCP granted appellant six percent impairment of the left leg. The period of the award ran for 17.28 weeks from September 10, 2015 to January 8, 2016.[4]

On appeal appellant argues that Dr. Kafka opined that she did not have muscle atrophy without measuring her lower extremity. She notes that Dr. Inda found that she had calf atrophy and that the atrophy was documented in physical therapy notes.

LEGAL PRECEDENT

The schedule award provision of FECA,[5] and its implementing federal regulations,[6] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

The sixth edition requires identifying the impairment for the Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[9] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

[4] OWCP moved the date of maximum medical improvement on September 10, 2015 because appellant received wage-loss compensation on September 9, 2015.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id*. at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[9] A.M.A., *Guides* 494-531.

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[10]

ANALYSIS

OWCP accepted the claim for a left ankle tibiofibular ligament strain and anterior tear, a left ankle calcaneofibular tear, a left ankle talus fracture and osteochondritis dissecans lesion, ankyloses of the left ankle, and a left intrasheath subluxation of the peroneal tendon. Appellant underwent two ankle surgeries on July 25, 2012 and March 20, 2013.

Appellant filed a claim for a schedule award on June 23, 2015. In an impairment evaluation dated July 17, 2015, Dr. Inda advised that appellant reached maximum medical improvement on July 8, 2014. He discussed her history of a peroneal tendon tear treated with surgery. Dr. Inda referenced his January 2014 report finding that appellant had six percent impairment of the lower extremity under Table 16-2 of the A.M.A., *Guides* for a peroneal tendon injury with moderate loss of motion. He indicated that the six percent lower extremity impairment equaled a nine percent impairment of the foot.

An OWCP medical adviser reviewed Dr. Inda's report and noted that he did not include examination findings or apply grade modifiers to his impairment rating. He made no specific reference to, or finding of, lower extremity atrophy in his impairment rating report. Dr. Inda recommended a second opinion examination.

Dr. Kafka, an OWCP referral physician, provided a September 9, 2015 impairment evaluation. On examination he found no swelling, muscle atrophy, or reduced sensation but mild tenderness near the lateral malleolus, some loss of motion in dorsiflexion and eversion, and pain with passive inversion. Dr. Kafka identified the diagnosis as a class 1 peroneal strain with mild motion loss according to Table 16-2 of the A.M.A., *Guides*, which yielded a default impairment value of five percent. He applied grade modifiers of two for physical examination based on moderate findings and one for functional history for a mild deficit. Dr. Kafka used the net adjustment formula and moved the default value over one place to find six percent left lower extremity permanent impairment.[11] He opined that appellant reached maximum medical improvement on November 26, 2013.

An OWCP medical adviser reviewed and agreed with Dr. Kafka's September 9, 2015 impairment rating. He found, however, that the date of maximum medical improvement should be the date of the impairment evaluation upon which OWCP based appellant's schedule award.[12]

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

[11] Utilizing the net adjustment formula discussed above, (GMFH-CDX) + (GMPE-CDX) or (1-1) + (2-1) = 1, yielded an adjustment of one. Dr. Kafka found clinical studies not useful.

[12] The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record, and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by OWCP. *See Mark A. Holloway*, 55 ECAB 321 (2004).

On appeal appellant contends that Dr. Kafka failed to obtain measurements to determine whether or not she had muscle atrophy. She alleges that Dr. Inga found muscle atrophy. Regardless, Dr. Inga also found that appellant had six percent left lower extremity impairment, which he converted to nine percent permanent impairment of the foot. Table 16-10 on page 530 of the A.M.A., *Guides* provides that six percent lower extremity impairment equals nine percent impairment of the foot and ankle. The record therefore is found not to contain any impairment opinion which supports any greater impairment than the six percent previously awarded.

Appellant is not entitled to receive two awards for injury to the same body part. The Board has held that, when impairment residuals of an injury to a member of the body specified in the schedule extend into an adjoining area of a member also enumerated in the schedule, such as an injury of a finger into the hand, or a hand into the arm, or of a foot into the leg, the schedule award should be made on the basis of the percentage loss of use of the larger member, not both members.[13] However, where impairment of the foot would yield more compensation than the impairment to the larger member, the leg, appellant should be given the benefit of the more favorable allowance.[14]

Section 8107(a) of FECA provides 288 weeks of compensation for total loss of a leg and 205 weeks of compensation for total loss of a foot.[15] For the leg, 288 times six percent equals 17.28 weeks of compensation. For the foot, 205 weeks times nine percent equals 18.45 weeks of compensation. The award to the foot is more favorable and thus the Board will modify OWCP's schedule award decision to find that appellant is entitled to 18.45 weeks of compensation for nine percent impairment of the left foot.[16]

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has nine percent permanent impairment of the left foot, entitling her to a total of 18.45 weeks of compensation.

[13] *See L.M.*, Docket No. 09-0690 (issued December 29, 2009); *Sam Jones*, 25 ECAB 163 (1974).

[14] *See L.M.*, *id*.

[15] 5 U.S.C. § 8107(a).

[16] *See R.D.*, Docket No. 07-0868 (issued July 25, 2007); *Sharon L. Orcutt*, Docket No. 04-0424 (issued July 26, 2004). OWCP's procedures provide that if the loss of two or more digits exceeds the loss for the hand or foot, the award should be the most favorable to the claimant. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(a)(2) (February 2013).

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: June 24, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board